BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
BERT AND HERMIA KAPLAN)

For Appellants: Hermia Kaplan,
in pro. per.

For Respondent: Michael E. Brownell
Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Bert and Hermia Kaplan against a proposed assessment of additional personal income tax in the amount of $2,630.97 for the year 1974.

Appellants' 1974 federai income tax return was audited by the Internal Revenue Service in 1977. The subsequent year, appellants and the federal authorities reached agreement with respect to certain adjustments which increased the formers' taxable income by $26,978; the resultant federal assessment of additional income tax was issued on March 26, 1979.' Appellants claim that they paid an additional $10,294 in federal income tax liability for the year 1974 on April 5, 1979 and that they notified respondent by letter the same day regarding the aforementioned agreement and their payment of additional federal income tax.

Respondent claims that it did not receive the letter purportedly sent by appellants on April 5, 1'379, and that it first received notification of the federal audit in April or May of 1979 by means of a federal audit report obtained from the Internal Revenue Service. Since the information contained in that report was not sufficiently detailed to allow respondent to immediately issue a proposed assessment, it was not until January 23, 1980, after the federal authorities had provided additional information, that the subject proposed assessment was issued..

The questions presented by this appeal are: (i) whether the subject proposed assessment is barred by the statute of limitations; and (ii) if not so barred, whether respondent's determination of deficiency based upon a federal audit report is entitled to a presumption of correctness such that the burden is on appellants to 'establish that it is erroneous.

Appellants, relying upon Revenue and Taxation Code section 18586.3,[1/] contend that respondent's proposed assessment is barred by the statute of limitations because it was not mailed to them within six months from the date of the letter allegedly sent on April 5, 1979. Respondent contends that appellants' letter, assuming that it was mailed, failed to meet the reporting requirements of section 18451. Additionally, respondent argues that appellants have failed to establish that their April 5, 1979 letter **was** ever mailed. A review of the relevant statutes, and regulations promulgated pursuant thereto, supports

1/ Hereinafter, all statutory references are to the Revenue and Taxation Code.

respondent's conclusion that the referenced letter, assuming that it was sent as alleged by appellants, failed to satisfy the requirements of section 18451. Accordingly, we need not address the question of whether appellants have established that the subject letter was ever mailed.

The relevant provisions of the Revenue and Taxation Code provide, in pertinent part, as follows:

Section 18586:

> Except in case of a fraudulent return and except as otherwise expressly provided in this part, every notice of a proposed deficiency assessment shall be mailed to the taxpayer within four years after the return was filed. No deficiency shall be assessed or collected with respect to the year for which the return was filed unless the notice is mailed within the four-year period or the period otherwise fixed. (Emphasis added.)

Section 18586.3:

> If a taxpayer is required to report a change or correction by the Commissioner of Internal Revenue or other officer of the United States or other competent authority or to file an amended return as required by Section 18451 and does report such change or files such return, a notice of proposed deficiency assessment resulting from such adjustments may be mailed to the taxpayer within six months from the date when such notice or amended return is filed with the Franchise Tax Board by the taxpayer ....

Section 18586.2:

> If a taxpayer shall fail to report a change or correction by the Commissioner of Internal Revenue or other officer of the United States or other competent authority or shall fail to file an amended return as required by Section 18451, a notice of proposed deficiency assessment resulting from such adjustment may be mailed to the taxpayer within four years after said change, correction or amended return

> is reported to or filed with the Federal Government.

Section 18451:

> If the amount of gross income or deductions for any year of any taxpayer as returned to the United States Treasury Department is changed.or corrected by the Commissioner of Internal Revenue or other officer of the United States or other competent authority, ... such taxpayer shall report such change or correction, ... within 90 days after the final determination of such change or correction ..., or as required by the Franchise Tax Board, and shall concede the accuracy of such determination or state wherein it is erroneous. ...

The regulation promulgated pursuant to section 18451 provides, in relevant part:

> (1) Section 18451 provides that if the amount of the taxable income of any taxpayer for any taxable year as returned to the United States Treasury Department is changed by the Commissioner of Internal Revenue or other competent federal authority, ... the taxpayer must notify the Franchise Tax Board of such changed taxable income . . . within 90 days after the final determination thereof and shall concede the accuracy thereof or state wherein it is erroneous. ...
>
> (2) Such notification shall be made by mailing to the Franchise Tax Board, Sacramento, California 95814, the original or a copy of the final determination ... as well as any other data upon which such final determination . .. is claimed. (Cal. Admin. Code, tit. 18, reg. 18581-18601(c), subds. (1) and (2).) (Emphasis added.)

As noted above, appellants contend that they notified respondent with respect to the final federal determination of their 1974 taxable income by virtue of the letter purportedly sent on April 5, 1979. That letter states, in relevant part, as follows:

> **Sometime** last October a settlement was made with the Internal Revenue Service

> concerning our tax return for the year 1974. I sent them a check today for $12,966.84 including interest of $2,672.84. This figure was arrived at by income averaging. ...

Appellants' letter fails to indicate the amount or character of the adjustment to income which increased their federal income tax liability. Furthermore, assuming that this letter was sent, appellants admittedly did not provide respondent with either the original or a copy of the final federal determination, as required by regulation 18581-18601(c), subdivision (2). We have previously held in appeals substantively identical to this one that, to satisfy the reporting requirements of section 18451, a taxpayer must report the substance of the change, not merely the fact that a change was made. (See, e.g., Appeal of Market Lessors, Inc., Cal. St. Bd. of Equal., Sept. 12, 1968.) For the reasons set forth above, the letter allegedly sent by appellants failed to satisfy the reporting requirements of section 18451. Therefore, we conclude that the subject proposed assessment is not barred by the six-month period specified by section 18586.3. Under the circumstances of this appeal, the four-year statute of limitations period provided by section 18586.2 is applicable. The record of this appeal reveals that respondent's January 23, 1980 issuance of the proposed deficiency assessment was well within that period.

With regard to the second issue presented by this appellant, it is well-settled that a deficiency assessment based on a federal audit report is presumptively correct (see Rev. & Tax. Code, § 18451) and that the taxpayer bears the burden of providing that respondent's determination is erroneous. (Appeal of Donald G. and Franceen Webb, Cal. St. Bd. of Equal., Aug. 19, 1975; Appeal of Nicholas H. Obritsch, Cal. St. Bd. of Equal., Feb. 17, 1959.) No such proof has been presented here. Consequently, we must conclude that appellants have failed to carry their burden of proof and that respondent's determination of deficiency based upon the federal audit report be sustained.

Appellants have stated that, should respondent's action be sustained, they qualify to employ income averaging for purposes of computing their personal income tax liability. There appears to be no controversy with regard to appellants' use of income averaging; respondent has specifically stated that, upon submission of the required information, appellants' use of income averaging will be reviewed.

Appeal of Bert and Hermia Kaplan

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Bert and Hermia Kaplan against a proposed assessment of additional personal income tax in the amount of $2,630.97 for the year 1974, be and the same is hereby sustained.

Done at Sacramento, California, this 26th day of July , 1982, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Dronenburg and Mr. Nevins present.

William M. Bennett , Chairman

Ernest J. Dronenburg, Jr. , Member

Richard Nevins , Member

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Member